

11 U.S.C. § 105(a)  
11 U.S.C. § 362(k)  
Corporate debtor  
Willful violation of stay

Concretize, Inc. v. Fireshield, Inc., Adversary No. 09-3312-rld  
In re Concretize, Inc., Case No. 08-35276-rld7

11/18/09

RLD

Unpub.

Corporate debtor commenced adversary proceeding against defendants seeking damages under §§ 362(k) and 105(a) for alleged willful violation of the automatic stay. Defendants moved to dismiss the adversary proceeding for failure to state a claim upon which relief can be granted.

Applying 9th Circuit precedent, the Court granted the motion to dismiss. By its terms § 362(k) applies only to an "individual" injured by a stay violation. Further, § 105(a) cannot be used to create a private right of action where one was not provided for in the Bankruptcy Code. See Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir. 2002). Consistent with the 9th Circuit's reasoning in Walls, the Court noted that the proper procedure for a corporate debtor to seek remedies for an alleged willful violation of the automatic stay is through a motion for contempt filed in the bankruptcy case pursuant to FRBP 9014 and 9020.

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9 UNITED STATES BANKRUPTCY COURT  
10 FOR THE DISTRICT OF OREGON

11 In Re: ) Bankruptcy Case  
12 CONCRETIZE, INC., ) No. 08-35276-rld7  
13 Debtor. )  
14 \_\_\_\_\_ )  
15 CONCRETIZE, INC., an Oregon ) Adv. No. 09-03312-rld  
16 corporation, )  
17 v. ) MEMORANDUM OPINION  
18 FIRESHIELD, INC., a Washington )  
19 corporation, ANDREW MOREN and )  
20 ROBERT MOREN, )  
21 Defendants. )  
22 \_\_\_\_\_ )

21 On September 23, 2009, shortly before its bankruptcy case  
22 closed, former chapter 7<sup>1</sup> debtor Concretize, Inc. ("Concretize") filed an  
23 adversary proceeding complaint ("Complaint") against Fireshield, Inc.,  
24 \_\_\_\_\_

25 <sup>1</sup>Unless otherwise indicated, all chapter, section and rule  
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the  
Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 Andrew Moren and Robert Moren (collectively, "Defendants") for an alleged  
2 willful violation of the automatic stay under § 362(a). The Complaint  
3 requested relief "pursuant to § 362(k) and § 105." On September 28,  
4 2009, the Defendants moved to dismiss ("Motion to Dismiss") the Complaint  
5 pursuant to Rule 7012 and Fed. R. Civ. P. 12(b)(6) on the basis that  
6 Concretize was not entitled to the relief sought in the Complaint.  
7 Thereafter Concretize filed a response ("Response") to the Motion to  
8 Dismiss, and Defendants filed a reply to the Response. I heard argument  
9 from counsel for the parties at a hearing ("Hearing") on November 17,  
10 2009.

11 Following argument and discussion with counsel at the Hearing,  
12 I advised the parties that I would grant the Motion to Dismiss based upon  
13 Concretize's failure to state a claim in the Complaint on which relief  
14 could be granted. In this Memorandum Opinion, I elaborate on the reasons  
15 for granting the Motion to Dismiss.

16 Section 362(k)(1) provides that "an individual injured by any  
17 willful violation of a stay provided by [§ 362] shall recover actual  
18 damages, including costs and attorneys' fees, and, in appropriate  
19 circumstances, may recover punitive damages." (Emphasis added.) The  
20 term "individual" is not defined in the Bankruptcy Code. While there is  
21 a split among the circuits, the Ninth Circuit, consistent with the Second  
22 Circuit, has determined that a corporation is not an "individual" for  
23 purposes of § 362(k) and consequently cannot prosecute a claim for relief  
24 in an adversary proceeding under § 362(k). See Johnson Env'tl. Corp. v.  
25 Knight (In re Goodman), 991 F.2d 613 (9th Cir. 1993); United States v.  
26 Arkison (In re Cascade Roads, Inc.), 34 F.3d 756, 766-67 (9th Cir. 1994).

1 We conclude that the Second Circuit's determination in  
2 Chateaugay is correct: "individual" means individual,  
3 and not a corporation or other artificial entity. The  
4 Fourth and Third Circuit's analysis is inconsistent  
5 with the principles of statutory construction set  
6 forth by the Supreme Court in Ron Pair. Chateaugay,  
Prairie Trunk, and MCEG Productions set forth a  
persuasive analysis of the issue, which is consistent  
with Ron Pair. The Second Circuit's reasoning, which  
we adopt, is as follows:

7 We have not located any legislative history to suggest  
8 that § 362[(k)] was meant to apply to "persons,"  
9 rather than being confined to "individuals." The  
10 section was added as part of the Bankruptcy Amendments  
11 and Federal Judgeship Act of 1984, Pub. L. No. 98-353,  
12 98 Stat. 333, 352, 1984 U.S. Code Cong. & Admin. News  
13 (98 Stat) 333, 352 (1984). There is no published  
14 legislative history suggesting the possibility of a  
15 drafting error or other inadvertence. Appellee  
conceded during oral argument that there is no  
legislative history showing that the section was meant  
to apply to "persons." Therefore, this is not one of  
those "rare cases [in which] the literal application  
of a statute will produce a result demonstrably at  
odds with the intention of its drafters." Ron Pair  
Enterprises, Inc., 109 S. Ct. at 1031 (brackets in  
original).

16 Goodman, 991 F.2d at 619.

17 At the Hearing, counsel for Concretize recognized the authority  
18 of Goodman and offered to amend the Complaint to delete the reference to  
19 § 362(k) as authority to pursue the claim for relief stated in the  
20 Complaint. However, counsel for Concretize further argued that § 105(a)  
21 provided alternative authority to support the claim as seeking relief for  
22 civil contempt.

23 Section 105(a) provides that "[t]he court may issue any order,  
24 process or judgment that is necessary or appropriate to carry out the  
25 provisions of [Title 11]." The use of the word "provisions" rather than  
26 "purposes" in § 105(a) suggests that its authority is limited to

1 implementing other provisions of the Bankruptcy Code rather than existing  
2 as an independent substantive authority.

3 While the bankruptcy courts have fashioned relief  
4 under Section 105(a) in a variety of situations, the  
5 powers granted by that statute may be exercised only  
6 in a manner consistent with the provisions of the  
7 Bankruptcy Code. That statute does not authorize the  
8 bankruptcy courts to create substantive rights that  
9 are otherwise unavailable under applicable law, or  
10 constitute a roving commission to do equity.

11 United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986).

12 In an analogous situation, the Ninth Circuit determined that  
13 Congress did not create a private right of action for damages for  
14 violation of the discharge injunction provided for in § 524 and affirmed  
15 the dismissal of the debtor's class action complaint, holding that "a  
16 private cause of action is not available under § 524, or through § 105."  
17 Walls v. Wells Fargo Bank, N.A., 276 F.3d 502, 504 (9th Cir. 2002)  
18 (emphasis added). The Ninth Circuit further concluded that violations of  
19 § 524 "may not independently be remedied through § 105 absent a contempt  
20 proceeding in the bankruptcy court." Id. at 506.

21 The Federal Rules of Bankruptcy Procedure provide that contempt  
22 proceedings before a bankruptcy court are contested matters that must be  
23 initiated by motion in the main bankruptcy case. See Rules 9020 and  
24 9014. Parties such as Concretize cannot use the bankruptcy court's  
25 contempt authority under § 105(a) to create and pursue a claim for relief  
26 in an adversary proceeding if the underlying claim upon which the  
adversary proceeding is commenced is not otherwise provided for in the  
Bankruptcy Code. Consequently, I conclude that Concretize has not stated  
a claim under § 362(k) or § 105(a) in its Complaint upon which relief can

be granted, and the Defendants' Motion to Dismiss is well taken.

Based on the foregoing analysis of the issues presented in the Complaint and the Motion to Dismiss, I find that the Motion to Dismiss should be granted. I will enter an order consistent with this Memorandum Opinion contemporaneously.

# # #

cc: Anita G. Manishan  
Douglas P. Cushing  
Joel B. Ard